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No. 730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
Petitioner

vs.

CORPORATION AND SECURITIES COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Wisconsin & Michigan Steamship Company prays that a writ of certiorari issue to review the decision or judgment of the Supreme Court of the State of Michigan entered in the above case on September 4, 1963, printed as Appendix "A"[1] p. 30, and on which timely application for rehearing was denied on October 9, 1963.

[1] Appendices "A" through "I" referred to herein are made a part of this petition.

I.

Citations to Opinions Below

a. The decision of the Supreme Court of the State of Michigan of which review is sought, printed as Appendix "A" hereto, p. 30, is officially reported in 371 Mich. Advance Sheets of October 3, 1963, p. 60 under the entitlement *Wisconsin & Michigan Steamship Company v. Corporation and Securities Commission*. The order denying the application or motion for rehearing, not printed, is Appendix "B" hereto, infra p. 42.

b. The administrative decision of the Michigan Corporation Tax Appeal Board, affirmed by the court below, is unreported and is printed in the Appendix for Appellant, in the court below, pp. 78a to 94a.[1]

II.

Jurisdiction

The decision of the Supreme Court of the State of Michigan was pronounced on the 4th day of September, 1963, and a timely Application for Rehearing was denied by the court below on October 9, 1963. The jurisdiction of this Court is involved under Title 28 U.S.C. § 1257 (3).

III.

Questions Presented

On the Merits:

Did the court below err in holding that the formula

[1] We file with this petition under provision of paragraph 1 of Rule 21, a certified copy of the record in the court below, including Appendix for Appellant, Appellant's exhibits 1 to 39 received in evidence at the hearing before the Corporation Board of Tax Appeals and filed in the Supreme Court appeal, and the Application for Rehearing in the Supreme Court of the State of Michigan, and the order of the Supreme Court of the State of Michigan denying the Application for Rehearing.

provided in Sec. 5c of the Michigan statute here in question [1] used by the Michigan Corporation and Securities Commission and Michigan Corporation Tax Appeal Board, in denying application of petitioner for a refund for the years 1952, 1953 and 1954 and in computing and determining the annual corporation franchise privilege fee or tax to be paid by Wisconsin & Michigan Steamship Company for the years 1956, 1957, 1958 and 1959, did not lay an unconstitutional or undue burden on interstate commerce conducted by Wisconsin & Michigan Steamship Company in violation of the Commerce Clause of the Constitution of the United States, Article 1, § 8(3)?

By this Petition:

Has the Supreme Court of Michigan decided a federal question of substance and importance not heretofore determined by this Court or in a way not in accord with applicable decisions of this Court?

IV.

Statute Involved

1. The statutory provision involved will be found in Pub. Acts. Mich. 1921, No. 85, Secs. 4 and 5, as amended by Act No. 183, Pub. Acts Mich. 1952, Secs. 5c and 5e thereof, added by Act No. 183 aforesaid (Mich. Stat. Ann. 1963 Cum. Supp. §§ 21.205, 21.208(3) and 21.208(5).) They are printed as Appendix "C" hereto, infra, p. 43.

a. Sec. 4, supra, requires each foreign and domestic corporation to pay at the time of filing its annual report with the Michigan Corporation and Securities Commis-

[1] Pub. Act Michigan 1921, No. 85, Sec. 5, as amended by Pub. Acts of Michigan 1952, No. 183, (Mich. Stat. Ann. 1963 Cum. Supp. § 21.208). Sec. 4, 5c and 5e of the statute are also involved and are printed as Appendix "C" hereto, infra, p. 43.

sion[4] an annual fee of 4 mills upon each dollar of its paid-up capital and surplus, subject to certain limitations. The measure of such tax is determined by formulae prescribed in Sec. 5c of the act as relates to carriers by water, supplemented and made mandatory by additional formulae prescribed by Sec. 5e, added to the act in 1952 by Pub. Act No. 183.

b. Sec. 5e prescribes in substance that the annual franchise fee imposed in Sec. 4, supra, shall be measured by the corporation's paid up capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this State is to the total of such tonnage so received and so discharged by such carrier within and without this State.[5]

c. Sec. 5e makes it mandatory that if an allocation factor used in the formula of Sec. 5e does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust the allocation factors in the manner prescribed. This the commission failed to do. Appellant's Exhibit 36, Appendix "I".

2. Validity of such provisions was tested in the court below by the Commerce Clause of the Constitution of the United States, Art. 1, §8(3) which vests in the Congress power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

---

[4] These annual reports are filed pursuant to Public Acts 1931, No. 327, Secs. 81 and 82 (Mich. Stat. Ann. 1963 Cum. Supp. Sec. 21.205).

[5] Such tax is construed as a franchise fee for the privilege of doing business within the state. This formula was struck down as violative of Article 1 Sec. 8(3) of the Constitution of the United States when applied to interstate commerce in the *Gartland* case, 339 Mich. 661, and the *Panhandle* case, 346 Mich. 50, certiorari denied by this Court, 352 U.S. 890, 77 S. Ct. 127, October Term, 1956 No. 354, and was not overruled as the Michigan Supreme Court indicated in the *Duluth* case, 353 Mich. 636.

V.

Concise Statement of the Case

Wisconsin & Michigan Steamship Company, petitioner, is a Wisconsin corporation admitted to do business in Michigan as a foreign corporation. The Michigan Corporation and Securities Commission respondent herein and the Michigan Corporation Board of Tax Appeals, constitute the administrative agency and quasi-judicial board, respectively, charged with proper determination of corporate franchise privilege fees to be paid the State of Michigan pursuant to the statutes involved.

Administrative Procedure:

For the year 1955 petitioner filed its annual report and paid the filing fee of $2.00 and the minimum fee of $10.00 under Sec. 4, as amended, by Pub. Acts Mich. 1952, No. 183 (Mich. Stat. Ann., 1963 Cum. Supp. 21.205 and 21.208(3) Sec. 5e.) In filing the Annual Report, petitioner, relying upon the decision of the Supreme Court of the State of Michigan in the *Gartland case*, 339 Mich. 661, excluded all interstate commerce and as it had done no intrastate business paid the minimum fee of $10.00, plus the filing fee of $2.00 under Sec. 4. Additional information was requested by respondent and supplied by petitioner, Appellant's Exhibit 4, the annual report for 1955, which showed that all passengers and cargo transported were transported in interstate commerce and that the company did no intrastate business for the period covered by the report. A determination was made of the tax by respondent on September 14, 1955, Appellant's Exhibit 14, petitioner being advised by respondent as follows:

"Wisconsin & Michigan Steamship Company
350 N. Plankinton Ave.
Milwaukee 3, Wisconsin

Gentlemen:

Your letter of September 9, 1955, received.

The ratio of tonnage received and discharged in Michigan to the total tonnage received and discharged is .49880.

The privilege fee is figured on the paid in capital of $232,200 and surplus of $2,510,741 at the rate of 4 mills on the dollar which results in $5,470.52 plus a filing fee of $2.00 for a total of $5,472.52.

Your remittance leaves a balance due the State of $5,460.52.

Kindly remit.

Very truly yours,
Ann Sawasky, Director
Profit Annual Reports"

A timely redetermination was requested by petitioner, Appellant's Exhibit 5,[1] in the Corporation Board of Tax Appeals, Appendix "D" herein. A redetermination was made by the Commissioner on January 6, 1956, Appellant's Exhibit 6, Appendix "E," which read:

"Foster & Meadows
Law Offices
Penobscot Building
Detroit 26, Michigan

Re: Wisconsin & Michigan Steamship Company
Franchise Tax 1955

Gentlemen:

It appears that the above named corporation had no intrastate commerce in Michigan during the period covered by the 1954 Annual Report, and that it is substantially in the same position as was Gartland Steamship Company with regard to activities in Michigan.

"Relying upon the Gartland case and the decision in

[1] Appellant's Exhibits 5, 6, 14, 15, 16 and 36 referred to by number were offered and received at the hearing before the Corporation Board of Tax Appeals and were a part of the record before the Supreme Court of the State of Michigan and because of their bearing on the administrative proceedings before the Corporation and Securities Commission, are made a part of this petition as appendices "D", "E", "F", "G", "H" and "I", respectively.

Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 71 S. Ct. Rep. 508, the Commission determines to accept the Reports as filed and determine the tax as paid.

Yours very truly,
James C. Allen
Commissioner"

Based on the decision of the redetermination of the tax by the Commissioner for the year 1955, petitioner, at the direction of the Commission, filed Supplemental Annual Reports for the years 1952, 1953 and 1954, Appellant's Exhibits 1A, 2A and 3A below, and thereafter filed an application for a refund for the overpayment of the franchise fees for those years. The letter of February 23, 1956, Appellant's Exhibit 15, Appendix "G," was considered by the Corporation and Securities Commission as an application for refund by Appellant's Exhibit 16, Appendix "H." Extended correspondence was exchanged between the attorneys for petitioner and respondent and it was not until May 10, 1960 that petitioner's application for refund was acted upon, Appellant's Exhibit 36, Appendix "I."

Appellant's Exhibits 7, 8, 9 and 10 were the Annual Reports for the years 1956, 1957, 1958 and 1959, all of which clearly disclosed that petitioner had engaged in no intrastate commerce, its business being 100 percent interstate commerce. Again, as in 1955 a $2.00 filing fee and a minimum franchise fee of $10.00 was paid at the time of filing the Reports for 1956, 1957, 1958 and 1959 and accepted by the Michigan Corporation and Securities Commission presumably in accordance with the ruling of Commissioner Allen as outlined in Exhibit 6, supra, and in accordance with the decision of the Supreme Court of the State of Michigan in the Gartland case, supra, and of this Court in the Spector

case 340 U.S. 602, 71 S. Ct. Rep. 508, as cited in the Commissioner's ruling.

Corporation Board of Tax Appeals—Proceedings

Following receipt of Appellant's Exhibit 36, Appendix "A," which was absolutely contrary to the ruling of Commissioner Allen, Exhibit 6 quoted above, and to the decision of the Supreme Court of the State of Michigan in the Gartland case, supra, and this Court's decision in the Spector case, supra, proceedings were commenced before the Corporation Board of Tax Appeals; one proceeding being for the refund of the overpayment of franchise fees for 1952, 1953 and 1954, and the other for the redetermination of the Corporation and Securities Commission's computation of franchise fees assessed for the years 1956, 1957, 1958 and 1959, Appendix for Appellant in the court below pp. 11a to 15a.

The consolidated cases came on for hearing before the Corporation Board of Tax Appeals on May 11, 1964. There was received in the proceedings a total of 29 exhibits.

Exhibits 1, 2 and 3 were the Annual Reports for the years 1952, 1953 and 1954 and Exhibits 4A, 5A and 6A were the Supplemental Annual Reports filed for those years.

Respondent's only witness called before the Corporation Board of Tax Appeals was Miss Ann Sawasky, Director of the Michigan Annual Report Section of Michigan Corporation and Securities Commission. She was called as a witness by the Assistant Attorney General for respondent. Her testimony appears on pp. 40a to 58a in the Appendix for Appellant in the court below. Miss Ann Sawasky's testimony Appendix for Appellant at pp. 32a, 33a and 41a:

"BY MR. FOSTER:

Q. And the 1952 tax was reassessed on the basis of so many mills on paid in capital and surplus?

A. That is correct.

Q. And that was despite the fact that the Wisconsin and Michigan Steamship Company was a Wisconsin corporation?

A. That is correct.

Q. Now you followed that same procedure, the Commission did, in assessing taxes against the Garland Steamship Company, did you not?

A. Yes, we did.

Q. And the Supreme Court, in 339 Michigan 661, said that you were entirely wrong, did they not?

A. That is correct.

Q. And said that the basis on which you could tax a foreign steamship company doing business in Michigan was only upon its intrastate business.

A. That is right.

Q. And that the Gartland Steamship Company case, as far as your Department knows, has never been reversed?

A. No, it has not.

Q. No. And the pending cases, the application for refund for 1952, 1953 and 1954, was held in for a very long time in your Department pending the outcome of the Panhandle case, [illegible]

A. I think that was one of the reasons, Mr. Foster.

Q. Yes. And the Panhandle case was finally decided and reversed in the Supreme Court?

A. That is right.

Q. And so was held pending the outcome of the Duluth, South Shore and Atlantic case?

A. That is right.

Q. And the Duluth, South Shore and Atlantic case was finally decided?

A. Yes.

Q. And the method by which your Commission redetermined the taxes due for the years 1956

Panhandle Eastern Pipeline Co. v. Corporation and Securities Commission, 346 Mich. 70.

Duluth, South Shore and Atlantic Railroad Co. v. Corporation and Securities Commission, 353 Mich. 636.

through 1939 was exactly contrary to what the Supreme Court said in the Gartland case, was it not?
A. Yes."

Mr. Otis Smith, Auditor General, and a member of the Corporation Board of Tax Appeals, which by statute is made up of the Auditor General, State Treasurer and Attorney General or an Assistant Attorney General, called Mr. Miles McKee, Resident Agent in Michigan and a Vice-President and Director of petitioner and his testimony is found on pp. 59a through 74a of the Appendix for Appellant in the court below. Findings of Fact, Conclusions of Law and Decision of the Appeal Board which upheld the Michigan Corporation and Securities Commission were filed January 25, 1962. Appendix for Appellant in the court below, pp. 78a to 94a.

Michigan Supreme Court Proceedings:

A timely general appeal was taken directly to the Supreme Court of the State of Michigan from the decision of the Corporation Board of Tax Appeals, as provided by statute. An Appendix for Appellant was filed together with appellant's Exhibits 1 through 39, which were part of the record before the Corporation Board of Tax Appeals. The brief on appeal for appellant sets forth under 1:

STATEMENT OF QUESTIONS INVOLVED.

1. **Did the Michigan Legislature intend that tons of cargo loaded on board or unloaded from vessels of Wisconsin & Michigan Steamship Company in Michigan ports, and which cargoes were transported solely and exlusively in interstate commerce between such ports and ports of other states, should be included in the numerator of the ratio for allocating paid-in capital and surplus of Wisconsin & Michigan Steamship Company for purposes of determining the amount of franchise fee due to the**

State of Michigan from Wisconsin & Michigan Steamship Company for the years in controversy?

Wisconsin & Michigan Steamship Company contends that the question should be answered, "No."

2. **If the answer to the first question is "Yes," does the inclusion of cargoes loaded and unloaded in Michigan ports and transported solely and exclusively in interstate commerce violate the Commerce Clause (Article 1, Section 8) of the Constitution of the United States?**

Wisconsin & Michigan Steamship Company contends that the question should be answered, "Yes."

The case was argued before the Supreme Court of Michigan on November 9, 1962. Early in January 1963, there having been a change in the membership of the Supreme Court of the State of Michigan, a request was made that the case be re-argued. The case was re-argued in the Supreme Court of the State of Michigan on June 4, 1963, and the decision of the Court Appendix "A") was handed down September 4, 1963. The Application for Rehearing was denied October 9, 1963. This petition for a writ of certiorari follows.

VI

REASONS FOR GRANTING THE WRIT

It is the position of petitioner (1) that in both the Corporation Board of Tax Appeals and the highest court of the State) there was drawn into question the validity of Sec. 4, 5, 5c and 56 of the statute involved on the grounds that as applied to petitioner it was repugnant to the Commerce Clause. The Corporation Board of Tax Appeals held to the contrary and was affirmed by the Supreme Court of the State (28 U.S.C. 1257(3)). Thus, the Michigan

Supreme Court has decided a federal question of substance within Rule 19(a); (2) that the precise questions presented have not been determined by this court and if any of its decisions bear thereon the court below has decided it in a way not in accord therewith; and (3) that quite apart from the direct interest of the respective parties, as pointed out in the Application for Rehearing filed in the court below, it is of vital importance to other litigants and parties[9] and to the taxpayers of the State of Michigan as well as to Michigan's system of taxation as a whole that the question presented be decided finally by this Court[10].

1. The court below, in its opinion, Appendix A, p. 30, stated:

> "Appellant does not claim that the State seeks to impose a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan. Nor does the State claim in this case that it could do so lawfully."

Much to the contrary petitioner has claimed from the time it asked for a redetermination of the franchise tax for the year 1955 that respondent was seeking to impose a tax upon it for conducting interstate business between Muskegon, Michigan and Milwaukee, Wisconsin, see appellant's Exhibit No. 5, Appendix "D" to this petition and petition on appeal; Appendix for Appellant in the court below, paragraph 5, sub-paragraphs 1 and 2, pp. 3a and 4a. It is equally clear from the record and pleadings (see answer of respondent to petition of appeal, paragraph 5, sub-para-

[9] Application for Rehearing, pp. 21, 22 and 23, Appendix C herein.

[10] There has been certified to this court by the Clerk of the Supreme Court of the State of Michigan, Appendix of Appellant below, the 39 exhibits received at the hearing before the Corporation Board of Tax Appeals, the opinion of the court below, the Application for Rehearing filed in the court below and the order denying the Application for Rehearing in the court below. For the purpose of this petition the page number references to the decision of the court below will be as shown in Appendix "A."

graphs (1) and (2), p. 8a of Appellant's Appendix in the court below, that respondent has claimed that it can lawfully use, under Sec. 5c, the ratio of tonnage first received and finally discharged in Michigan, irrespective of the fact that all such tonnage was in interstate commerce. The record is clear that petitioner's business was 100 percent interstate commerce and that Sec. 5c(1) relating to carriers by water was subject to the provisions of Sec. 5e.

The court below has decided the case as though Secs. 4 and 5e of the Michigan statute do not exist. No consideration whatever has been given by respondent to adjust the formula of Sec. 5 so as to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to the State of Michigan.

In *Gartland*, 339 Mich. 661, a case directly on point with the exception that in *Gartland* the corporation engaged to some small degree in intrastate commerce whereas petitioner here engaged in no intrastate commerce, its business being 100 percent interstate, the unanimous opinion of the court ruled against respondent's computation of the tax which was computed similarly to that of petitioner. At page 674:

> "It is the opinion of this Court by the enactment of * * *, the legislature gave to the commission the right and duty to apply a method of determining Gartland's tax calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state."
>
> "The order and opinion of the Corporation Tax Appeal Board affirming the computation of the commission is reversed, and the commission is directed to recompute the annual privilege fee of Gartland Steamship Company, a Delaware corporation, ex-

cluding any and all cargoes transported in interstate or foreign commerce."

In *Panhandle* 346 Mich. 50, certiorari denied by this court 352 U. S. 890, 77 S. Ct. 127, where the question was again considered, the opinion of the Michigan Supreme Court at page 56 reads:

> "* * * In our opinion it is clear that the formula used by the Commission includes receipts from a business not related to plaintiff's intrastate business, and under the authority of the Gartland case, supra, it is arbitrary and imposes an unjust burden upon interstate commerce * * *."

In *Duluth*, 353 Mich. 636, the question was again reviewed and the court in effect affirmed both Gartland and Panhandle. In this case Duluth engaged in extensive intrastate commerce within Michigan and the case was distinguished on this basis. At page 664 we read:

> "Both of these cases may be distinguished from our case on their facts. Gartland had no property in Michigan and did what the court apparently regarded as only an inconsequential intrastate business in Michigan. Over 90% of Panhandle's pipeline, properties and activities were located outside of Michigan. * * * Neither case involved the identical formula objected to here. And in both cases, this court, while rejecting the specific formula, upheld the right to levy the tax and ordered recomputation under Section 5e to achieve a reasonable result.
>
> "It is obvious that what the state offered in service and protection to the Gartland and Panhandle taxpayers in return for the tax was substantially different (particularly in the Gartland case) from the fact situation considered herein.
>
> "* * * Both Gartland and Panhandle opinions, however, relied upon *County* v. *Mountain States T & T Co.* 249 U.S. 384 (55 S. Ct. 477, L. Ed. 934) for constitutional authority. Both failed to distin-

guish between the direct taxation of interstate commerce (which Cooney ruled out) and the employment of an interstate commerce factor in the formula for determining the amount of paid-up capital and surplus to be allocated to Michigan in computing the fee to be assessed for doing intrastate business in Michigan.

* * *

"We now limit the application of the opinions in Gartland and Panhandle and hold that there is no constitutional barrier to the use of an interstate commerce factor in the allocation formula for determining the portion of paid-up capital and surplus allocable to Michigan for computation of a franchise tax for the right to carry on intrastate business in Michigan, where, as here, there is no showing that such formula reaches an unreasonable or discriminatory result."

It is abundantly clear that the limitation recited above in no way diminished or limited the application of the Gartland and Panhandle opinions to a taxpayer engaged wholly in interstate commerce. If anything, it buttressed the opinions. The limitation of the opinions pertains to a taxpayer engaged in intrastate commerce within Michigan. Petitioner engaged in no intrastate commerce in Michigan hence the opinions, as limited, are quite inapplicable. On the contrary without any intrastate commerce in Michigan, there leaves only the interstate commerce of the petitioner on which the tax could be based. This would clearly constitute then a direct tax on interstate commerce which the court in Duluth, supra, still pointed out was ruled out by *Cooney* v. *Mountain States T & T Co.*, 294 U. S. 384.

The Legislature has enacted the legislation and the courts have spoken clearly and succinctly on its application to a foreign corporation engaged solely and exclusively in interstate commerce.

The court below in its opinion, Appendix A, pg. 36 stated:

> "In the Duluth case, 353 Mich. 636, however, this Court severely limited the opinion in Gartland and Panhandle and realistically considered, overruled their holding to the extent that they could be construed to mean what appellant claims for them here."

Petitioner's only claim for Gartland and Panhandle was that interstate commerce should, under Sec. 5e, be excluded. Panhandle, on the basis of Gartland, so held and this Court denied certiorari in Panhandle, 352 U. S. 890, 77 S. Ct. 127 October term 1956, No. 354.

If, as the court stated, Duluth, realistically considered, overruled the decisions of the court below, specifically in Gartland and Panhandle, to the extent that they could be construed to mean what appellant below and petitioner here claimed for them, then the Michigan Supreme Court has completely reversed the Gartland and Panhandle decisions and rendered a decision absolutely contra to the numerous cases of this court which has, on several occasions, considered the various aspects of the right of a state to impose a franchise or privilege tax on a foreign corporation for the right to do business within a state.

(a) By the failure of the court below to recognize that the use of the formula under Sec. 5e by respondent without adherance to the mandate of Sec 5 directing that the formula must be computed or calculated so as to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to the state, the precise federal question as to whether such action resulted in an undue burden upon interstate commerce in violation of the Commerce Clause was distinctly and unmistakably raised.

(b) Petitioner freely admits that in 1941 it applied for

admission to do business locally within the state and was granted that privilege. It is because of this fact that petitioner also admits it is subject to the payment of the statutory minimum fee of $10.00 annually plus the $2.00 filing fee. This being due whether it exercises the privilege of engaging in business *within* the state or not. The fact is clear, however, that petitioner has been engaged solely in interstate commerce and has not engaged in local business within the state since 1941 and particularly for the years in question here. Any further assessment of privilege fees for the right to do business within the State of Michigan must rest squarely on whether petitioner did in fact engage in such local or interstate business because the assessment of additional fees over and above the statutory minimum must bear a reasonable relationship to the receipts, activity, business and capital reasonably attributable to the state. If it did no business within the state then only the minimum fee, as established by the statute is assessable. The court below has completely disregarded this aspect of the matter. In drafting the statute the legislature clearly recognized that the formula provided in Sec. 5c standing alone would be stricken as violative of the Commerce Clause and an undue burden on the privilege of engaging in interstate commerce. For this very cogent reason it added Sec. 5e which clearly and unequivocably directs the Commission to adjust the formula by excluding one or more of its factors in order to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state.

If, in the application of the formula of Sec. 5c, it appears petitioner did not engage in business locally or interstate business within the state then Sec. 5e must be considered to make the formula just and equitable. Excluding from the

formula of Sec. 5c all of petitioner's interstate business there can be no further tax other than the minimum provided by the statute. The purpose of Sec. 5c was to assure that the formula of Sec. 5c be calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to the State of Michigan. If as here, petitioner engaged in no local or intrastate business within the state, how can it be said the formula of Sec. 5c as evoked by respondent and upheld by the court below did not impose an unjust burden on petitioner's only business which was wholly interstate in nature. It clearly cannot.

(c) In the Panhandle decision of the court below it stated in no uncertain or ambiguous language, that in using the formula of Sec. 5 of the statute, the state agencies placed a tax on interstate business done by Panhandle, and that they could not so increase the amount of the privilege tax involved. The judgment of the court in the Panhandle case followed the opinion by ordering the state agencies to exclude from their computation of the tax "any and all receipts" of Panhandle "derived from the interstate sale in the State of Michigan of natural gas transported by it in interstate commerce through its pipelines from points outside the State of Michigan". Thus the effect of the court's judgment was to hold that Sec. 5, as applied, violated the Commerce Clause. In denying certiorari of the Panhandle decision, 346 Mich. 50, this court was in full accord with the decision of the court below.

The instant case, although involving a water carrier and Sec. 5c, which is identical to Sec. 5 in the Panhandle case, falls full square within the decision of the Panhandle case. Without the qualifying factors of Sec. 5c to achieve a reasonable result based upon activity reasonably attribu-

table to the state, the formula of Sec. 56, standing alone, continues to violate the Commerce Clause and the clear holdings of this court.

(3) The opinion and final judgment of the court below, 371 Mich. 61, was explicit in considering the federal question raised involving Section 56 of the statute as applied to petitioner. Headnotes 2, 3, 5 and 6, as well as the court's statement at page 67 that the cases of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (71 S. Ct. 508, 95 L. ed 573); *Crandall* v. *Mountain States Telephone and Telegraph Co.*, 294 U. S. 384 (55 S. Ct. 477, 79 L. ed. 934) among others are inapposite to determination of the validity of the privilege fee sought to be charged to petitioner here, clearly consider the legal constitutional principles based upon the Commerce Clause. In so doing, the Supreme Court of Michigan has decided a federal question of substance unquestionably contra to the dictates of this court.

2. Insofar as the merits of the controversy are concerned, it is petitioner's position that the state, through its legislative agency, respondent here, is prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the formula used to measure a corporate privilege fee for a foreign corporation who has qualified to do business within a state. This being particularly true where the foreign corporation is not engaged in any local or intrastate commerce within the State of Michigan. To do so is arbitrary and unreasonable and a discriminatory result is achieved and an undue burden is placed on interstate commerce. It is likewise true that when a foreign corporation qualified to do business in Michigan engages in both intrastate and interstate commerce and such can be realistically separated *only* the

intrastate commerce may be used as a basis for the assessment of a privilege fee or tax.

Where as here, however, petitioner engaged in no local or intrastate commerce and still the respondent persists in using the interstate business of petitioner in computing franchise fees over and above the minimum provided by the statute and which bear no relation whatever to business done within the state, then there can be but one inescapable conclusion, namely: an arbitrary and unreasonable result is achieved and the only business being taxed is interstate commerce. This result has been stricken repeatedly by this court, as repugnant to the Commerce Clause of the Federal Constitution.

(a) The issue, as it applies to foreign corporations engaged solely in interstate commerce is no longer debatable as we view the prior holdings of this court.

Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, struck down a state tax imposed upon the franchise of a foreign corporation for the privilege of doing business within the State of Connecticut when the business consisted solely of interstate commerce.

A review of the privilege tax assessed by respondent over and above the statutory minimum provided by the statute and based solely upon petitioner's interstate commerce (it engaged in no local or intrastate commerce within the State of Michigan), speaks for itself in its arbitrary and unreasonable result for it bears no relationship whatever to petitioner's activity within the state.

1952	$3,691.19	1956	$6,333.47
1953	4,360.03	1957	6,960.87
1954	4,947.78	1958	7,611.56
		1959	8,025.30

Strict compliance with Sec. 5c and without reference to Sec. 5e results in an allocation of in excess of 49% of petitioner's tonnage and therefore in excess of 49% of its paid-up capital and surplus to Michigan when in fact no intrastate business was performed in Michigan. The result of the formula used by respondent in computing petitioner's tax is to deprive petitioner of due process of law, for, as computed, the franchise tax is not related in any degree to petitioner's taxable activities in Michigan, for there were none.

The effect of including in excess of 49% of petitioner's interstate tonnages in the formula is to enhance the tax and to inflate the amount of capital and surplus attributable to Michigan. If there was some relationship between the 49% of petitioner's interstate business and its privilege of doing business in Michigan, there might be some reason for the present assessment. It is abundantly clear, however that no such relationship exists. Respondent would treat a portion of petitioner's interstate business as intrastate business conducted in Michigan. The facts and law preclude such an interpretation.

The formula as applied by respondent is not a formula "reasonably apportioning business done within this state." In the formula and ultimately in the tax, respondent has included tonnages which the state has no right to tax and which are in no way related to intrastate commerce. The inclusion, therefore, of tonnages which are without question interstate in nature clearly renders the formula as applied here, arbitrary, unreasonable and in violation of the Commerce Clause as a *direct* tax on interstate commerce.

It is evident from the reasoning propounded by respondent, that were the decision of the court below to be per-

mitted to stand, a dangerous and totally inequitable precedent would be set. The present posture of the litigation calls upon petitioner to pay an additional $25,930.90 in franchise taxes which have been imposed upon a foreign corporation engaged solely and exclusively in interstate commerce. Were this holding to be sustained, every state could impose a like tax on a corporation whose vessels call at the port of a given state. This burden upon interstate commerce is exactly the situation our forefathers sought to prevent in framing the Federal Constitution and the Commerce Clause contained therein.

The Supreme Court of the United States in *Cheney Brothers Co.* v. *Mass.*, 246 U. S. 147, long ago established the principle that:

> "A corporation engaged in 'wholly interstate commerce' within a state was immune from a franchise fee or excise tax for the privilege of doing local business."

This was re-affirmed in *Alpha Portland Cement Co.* v. *Mass.*, 268 U. S. 203.

> "An excise of franchise tax is ipso facto a tax for the right of doing business in the state. Where the business which the corporation does in the state is wholly interstate, the corporation is exercising a privilege which cannot be conferred on or withheld by the state, but to which the corporation is entitled by the Constitution of the United States."

In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, a franchise tax on wholly interstate commerce was unconstitutional.

In practical effect Act No. 85 PA 1921, as amended, amounts to an imposition of a tax upon the privilege of loading and unloading cargoes in interstate commerce. This is particularly so in the case of petitioner whose entire business was interstate commerce.

It is true enough that when a corporation is engaged in intrastate commerce within a state, the fact that it is also engaged in interstate commerce will not exempt it from paying a franchise tax for the privilege of conducting its intrastate business. There are two important limitations on this principle: First, the fact that taxpayer engaged in interstate commerce must *not* be used to increase the tax exacted from it for the privilege of transacting intrastate commerce; and second, acts and transactions which are *essential* and *integral* parts of the interstate process cannot be considered at all. There are many authorities, but we will recite only a few. The principle is stated thus in *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, at page 470:

> "* * * It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. * * *
>
> "And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction *in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without also withdrawing from the interstate business.*" (Emphasis ours)

In *Railway Express Agency v. Virginia*, 347 U. S. 359 the Express Agency did no intrastate business at all; it simply received packages for interstate shipment. The State of Virginia levied an annual license tax of the gross receipts of this business, which it called a property tax. In holding the tax unconstitutional, the Court said at page 368:

> "It is enough to say that we recently have ruled that local incidents, such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax."

As early as the case of *State Freight Tax*, 15 Wall. (U. S.) 232, it became clear that the commerce clause prohibits a state from selecting certain local aspects of interstate and foreign commerce as incidents for the imposition of a fee or tax. The Supreme Court has never deviated from this position. *Nippert* v. *Richmond*, 327 U. S. 416.

The loading and unloading of cargo is as much a part of interstate and foreign commerce as is the transportation of such cargo. *Puget Sound Stevedoring Company* v. *State Tax Commission*, 302 U. S. 90, 92, recognizes this for it was there said at page 92:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard a ship and taken off at destination."

It is plain that the loading and unloading of cargoes carried in interstate and foreign commerce are part of that commerce and, therefore, cannot be made the subject of a privilege fee. *Joseph* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422.

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, a Pennsylvania tax, assessed on the capital stock of a New Jersey corporation which operated a ferry between New Jersey and Pennsylvania, was held invalid. The state argued that the corporation was doing business in Pennsylvania in that it landed and received passengers and freight at a leased dock in Pennsylvania. To this the Court answered, page 203:

> "As to the first reason thus expressed, it may be answered that the business of landing and receiving,

passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in such transportation."

The fact that the corporation could not lease its wharf in Philadelphia except by the implied consent of the Legislature of the Commonwealth, was held by the court to be of no significance for:

> "... if by reason of landing or receiving passengers and freight at wharves, or other places in a state, they can be taxed by the state on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede and even destroy such commerce with the citizens of the state." (Page 205)

Although the Puget Sound case involved a tax on gross receipts and Act No. 85 of PA 1921 involves a privilege fee computed on the basis of tonnages loaded and unloaded, the distinction is one without difference, for both tax the privilege of carrying on interstate commerce.

Recently the Supreme Court of Appeals of West Virginia had before it issues very similar to those which this Court is now asked to decide. *American Barge Line Company v. Koontz*, 68 S. E. (2d) 50. West Virginia sought to impose a privilege tax upon the transportation of freight by water, based upon the proportion of gross income and determined by ton miles of freight carried within the state. The Court held that the state could levy a tax on the inter-

state freights (from port to port within West Virginia) but that the freight earned in interstate commerce, whether passing through West Virginia or whether beginning or ending here, could not lawfully be subjected to taxation by West Virginia. The court said on page 63:

> "There is certainly no taxable incident in connection with through traffic of the plaintiff's occurring within the State of West Virginia which would afford a basis for the tax. And the only incidents occurring in the State of West Virginia connected with one point interstate traffic is delivery of shipments so classified to their destination, or the acceptance and embarkation of shipments at points in this state destined to points in other states. Those incidents are not sufficient to support the tax."

Under the Constitution of the United States, the power to regulate interstate and foreign commerce belongs solely to congress. Any exaction in any form made on interstate or foreign commerce is a burden on that commerce almost as to a regulation thereof. *Lehigh v. Port of Mobile*, 127 U. S. 624, 635. The exaction may be invalid because it takes the form of a direct burden, *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101; *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555; *Eureka v. Heard*, 329 U. S. 249; but whether or not the burden is direct, it will be struck down if it substantially or unreasonably burdens or obstructs the free flow of commerce. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, supra; *Puget Sound Stevedoring Co. v. State Tax Commission*, supra; *Joseph v. Carter & Weekes Stevedoring Co.*, supra.

Petitioner here has been assessed according to the number of cars loaded or unloaded in Michigan irrespective of the fact it engaged in no intrastate commerce. As such, it constitutes a *direct* tax on the interstate commerce engaged

in by petitioner and thus clearly constitutes an unlawful burden on interstate commerce.

Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384 (55 S. Ct. 477, 79 L. Ed. 934) still recites the law concerning the right of a state to impose an excise or franchise fee on a corporation engaged wholly in interstate commerce for the privilege of doing local business. This Court stated (pp. 392-393):

> "There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. *But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitute such commerce or the privilege of engaging in it.* And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. * * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the tax*; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. (Emphasis ours)

In *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465 (51 S. Ct. 499, 75 L. Ed. 1171), this Court left no doubt that a state cannot increase its tax on interstate commerce by any device calling for the inclusion of ton miles of interstate freight and, further, that transactions which are an essential and integral part of interstate commerce cannot be considered, saying at p. 470:

> "It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce

> nor on gross receipts therefrom * * *. And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing from the interstate business."

The rule governing the case now under consideration was clearly stated in *Commissioner of Corporation & Tax'n.* v. *Ford Motor Co.*, 308 Mass. 558, 33 NE(2) 318.

> "A state is without power to tax a foreign corporation for the privilege of engaging in interstate commerce, or to exact an excise from a foreign corporation that conducts only an interstate business within the state."

3. The Hartland & Panhandle decisions of the highest court of the State of Michigan appeared at the time of their pronouncement to settle the question of how the privilege tax, over and above the minimum statutory amount, should be calculated for foreign corporations qualified to do business in Michigan and engaged in interstate and intrastate commerce. This was particularly true when this court denied certiorari in the Panhandle case, 340 Mich. 60, certiorari denied 352 U. S. 890. There likewise appeared to be little doubt as to how the tax would be calculated when a foreign corporation qualified to do business in Michigan, engaged solely in interstate commerce. The result of the decision of the court below in the instant case, however, has caused greater confusion and uncertainty than ever before by its obvious contradictory holding to its own prior

decisions in Gartland and Panhandle not to mention the pronouncements of this court on the subject.

Petitioner stresses that a review of the decision of the court below is vital to the encouragement of those carriers by water engaged in either interstate and intrastate commerce or both, to eliminate the inequities prominent in the decision of the court below and to clarify the constitutional principles involved. This court is respectfully urged to issue its writ of certiorari in order that the decision of the Michigan Supreme Court be reviewed and, that the questions presented be set at rest.

VII.

CONCLUSION

Therefore, petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Michigan.

January 7, 1964

Respectfully submitted,

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Wisconsin & Michigan Steamship Company

John A. Mundell, Jr.
Of Counsel

APPENDIX A

OPINION OF THE COURT BELOW

STATE OF MICHIGAN
SUPREME COURT

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,

Petitioner-Appellant,

v.

CORPORATION AND SECURITIES COMMISSION,

Respondent-Appellee.

BEFORE THE ENTIRE BENCH, except Smith, J.

SOURIS, J. (for affirmance)

Appellant steamship company is a Wisconsin corporation carrying passengers, automobiles and other freight across Lake Michigan between the ports of Milwaukee, Wisconsin and Muskegon, Michigan. In 1941, *upon its own application*, it was admitted to do intrastate business within Michigan. From 1952 through 1959, it filed the annual reports required by law to be filed with the corporation and securities commission by every domestic and foreign profit corporation granted the privilege of doing such business within this State. Section 4 of PA 1921, No. 85, as amended (CLS 1956, § 450.304) (Stat Ann 1958 Cum Supp § 21.205) The appeal from the corporation tax appeal board concerns the amount due the State during those years (except 1955) as appellant's annual franchise fee payable at the time of filing its annual reports.

Appellant does not claim that the State seeks to impose

a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan. Nor does the State claim in this case that it could do so lawfully. Instead, appellant *voluntarily* applied for admission to do business locally within this State and was granted that privilege. While appellant concedes the State may charge it the statutory minimum fee of $10 annually for the local privilege granted notwithstanding its professed failure to date to exercise the granted privilege, it denies the State's right to charge it a privilege fee based upon any formula which takes into account any of the appellant's interstate business. Appellant and the State spend considerable effort in arguing whether appellant's activities in Michigan constitute exercise of its local privilege. Were this a case in which the State sought to compel appellant to qualify for admission and to pay a privilege fee therefor on the ground that its activities in Michigan constituted local business, we would be required to resolve the parties' argument. However, this is not such a case. Appellant does not deny that it is liable for some fee for its voluntarily acquired privilege, whether exercised or not. The only question is its amount and the answer to that question *does not* depend upon whether or to what extent appellant engages in what may be called purely local business.

Michigan's annual franchise fees are imposed alike upon domestic corporations and foreign corporations admitted to do business within the State. Corporations, both domestic and foreign, not maintaining a regular place of business outside this State, other than a statutory office, paid, during the period here in controversy, an annual privilege fee of 4 mills upon each dollar of their entire paid-up capital and surplus.[1] Except for certain classes of carriers, of which

[1] CLS 1956, § 450.305 (Stat Ann 1961 Cum Supp § 21.203).

appellant is one, other corporations are required to pay annual franchise fees measured by that proportion of their paid up capital and surplus attributable to Michigan in accordance with an apportionment formula known as the Massachusetts formula.[2] The annual franchise fees of motor carriers of property and all carriers by water, such as appellant, whether domestic corporations or foreign corporations admitted to do business in Michigan, are measured by the apportionment formula set forth in the margin.[3] This formula provides for the allocation of a portion of the carrier's paid-up capital and surplus to Michigan, and thereby subject to Michigan's 4 mill franchise fee rate, in proportion to the ratio which the carrier's total tonnages of revenue passengers[4] and cargo received or discharged within Michigan bears to its total tonnages received and discharged everywhere.

It is appellant's claim that inasmuch as it engaged solely in interstate commerce in Michigan, the annual franchise fee claimed from it by the State, determined in accordance with the statutory formula which takes into account appellant's interstate tonnages, constituted a direct

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[2] *Ibid.* The statutory provision is reproduced and described by Mr. Justice Talbot Smith in *Cleveland-Cliffs Iron Co.* v. *Corporation & Securities Commission*, 351 Mich. 652, 672-674.

[3] "(1) In the case of motor carriers of property, and carriers by water, the annual franchise fee shall be measured by that portion of the corporation's paid-up capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this state is to the total of such tonnage so received and so discharged by such carrier within and without this state." ***" C.L.S. 1956, § 450.305c (Stat. Ann. 1961 Cum. Supp. § 21.203(3)).

[4] Although the attorney general tells us in his brief that the statutory reference to "tonnage of revenue passengers" has been construed to refer "to the number of passengers, rather than to their gross weight", we note from the appellant's annual reports filed as exhibits that weight was in fact used, a hypothetical average of 150 pounds per passenger. The matter is not important to the issue presented by this appeal.

burden by the State on interstate commerce in contravention of the commerce clause of the Federal Constitution, Art. I, § 8. Relying upon *Gartland Steamship Company* v. *Corporation & Securities Commission*, 339 Mich. 661, and *Panhandle Eastern Pipe Line Company* v. *Corporation & Securities Commission*, 346 Mich. 50, appellant argues that none of its interstate passenger and cargo tonnages should have been considered in computing the apportionment factor to be applied to its paid-up capital and surplus for determining what portion thereof was subject to the 4 mill franchise fee rate. Since appellant's entire business in Michigan, according to its view, was in interstate commerce, it contends that none of its tonnage properly could be taken into account and that the apportionment factor under such circumstances should have been zero. That result, of course, would have relieved appellant of all liability under the statutory formula (although appellant concedes liability for the annual $10 minimum fee required by CLS 1956, § 450.304 [Stat. Ann. 1959 Cum. Supp. § 21.205]).[1] In support of its contention that inclusion of its interstate tonnage in application of the statutory apportionment formula results in a direct burden by the State upon interstate commerce forbidden by the commerce clause, appellant cites *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (71 S. Ct. 508, 95 L. ed. 573); *Conner* v. *Mountain States Telephone & Telegraph Co.*, 284 U. S. 384 (55 S. Ct. 477, 79 L. ed. 934); and *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555 (45 S. Ct. 184, 69 L. ed. 439), among many others.

Michigan's corporate franchise fee is not an *ad valorem* tax on property, nor is it an income tax, a gross receipts tax

[1] Implicit in appellant's concession of liability for the annual $10 minimum franchise fee is its recognition that the State properly may charge some fee at least when the franchise granted was voluntarily sought, whether or not it was actually exercised.

nor a sales tax. Keeping in mind what Michigan's franchise fee is not, it may be conceded that the State may not otherwise impose a charge upon appellant for the privilege of doing an interstate business in Michigan. For this proposition of law Spector, Cooney and Ozark, *supra*, relied upon by appellant, are only a few of the authorities that may be cited. See *Duluth, South Shore & Atlantic Railroad Co.* v. *Corporation & Securities Commission*, 353 Mich. 636, at p. 655 (appeal dismissed and certiorari denied, 359 U. S. 310 [79 S. Ct. 876, 3 L. ed. 2d 831]). But these authorities are inapposite to determination of the validity of the privilege fee sought to be charged to this appellant.

As we have noted before, it is a fee imposed by the State, upon domestic as well as foreign corporations, for the *privilege* of exercising corporate franchises *within* this State *Union Steam Pump Sales Co.* v. *Secretary of State*, 216 Mich. 261; *In re Detroit International Bridge Co.* v. *Corporation Tax Appeal Board of Michigan*, 287 U. S. 295 (53 S. Ct. 137, 77 L. ed. 314); *Cleveland Cliffs Iron Co.* v. *Corporation & Securities Commission*, 351 Mich. 652, and Duluth, *supra*. The fee charged is for the privilege granted, as the legislature itself has stated, "irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period." C. L. S. 1956, § 450.304 (Stat. Ann. 1950 Cum. Supp. § 21.205). *See Holland Hitch Company* v. *State of Michigan*, 318 Mich. 474, 479.

It is not the privilege to do interstate business in Michigan for which appellant applied to the State and for the grant of which the State seeks to charge it an annual fee. Its right to engage in such interstate business in Michigan is not subject to the State's grant or denial. Appellant sought, and was granted, the privilege to do *intrastate*

business in Michigan.* Whether or not appellant actually exercised its corporate franchises in Michigan in the conduct of intrastate business, it was granted the privilege to do so, upon its own application, and, so, must pay. As Mr. Justice Edwards pointed out in *Duluth*, 353 Mich. 636, at p. 657, the United States Supreme Court has frequently upheld such state privilege or franchise fees levied upon the right to do intrastate business as not offensive to the commerce clause. *St. Louis-San Francisco R. Co. v. Middlekamp*, 256 U. S. 226 (41 S. Ct. 489, 65 L. ed. 905); *Hump*

*In view of appellant's contention that its business is "100% interstate", one wonders why appellant voluntarily applied, in 1941, for the privilege of doing intrastate business in Michigan and then, assertedly, never exercised the privilege granted. An examination of Wisconsin law suggests a possible reason for the seemingly inconsistent course followed by appellant. 1939 Wis. Stat. § 71.02 (3) (d) provided that "Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state." (This provision is the same today; see Wis. Stat. Ann § 71.07 (2) (c).) In *Trane Co. v. Tax Commission* (1940), 235 Wis. 516, the Wisconsin Supreme Court held that the entire income of a Wisconsin manufacturing corporation was derived from business transacted and property located within the state, and so subject to Wisconsin's income tax notwithstanding that nearly one third of the corporation's net income accrued from sales originated by sales representatives located outside of the state. For a discussion of other Wisconsin cases construing the statutory language in such a manner as to subject all of a corporation's income to the Wisconsin income tax, even though the corporation engaged in activities in other states, see *Department of Taxation v. Blatz Brewing Co.* (1961), 12 Wis. 2d 615. Although most of those cases involved manufacturing corporations, still the judicial attitude exhibited in those cases may have induced appellant to try to acquire all possible indicia of engaging in business outside of Wisconsin in order to qualify for the apportionment benefits of Wisconsin's income tax law. One means by which it could do this was to obtain the privilege of doing intrastate business in Michigan. As the Wisconsin court pointed out in *Blatz*, *supra*, "Although 'engaged in business' means something less than the standard which requires a license to do business in a state, still not every 'activity' out of the state constitutes engaging in business there within the meaning of sec. 71.07 (2) . . . ." Thus, appellant could argue that its qualification to do business in Michigan was evidence of its having met, and, indeed having exceeded, the standard required to be "engaged in business" in another state.

Hairpin Manufacturing Co. v. *Emmerson*, 258 U. S. 290 (42 S. Ct. 305, 66 L. ed. 622); *International Shoe Co.* v. *Shartel*, 279 U. S. 429 (49 S. Ct. 380; 73 L. ed. 781); *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331 (60 S. Ct. 273, 84 L. ed. 304); *International Harvester Co.* v. *Evatt*, 329 U. S. 416 (67 S. Ct. 444, 91 L. ed. 390); *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662 (69 S. Ct. 1264; 93 L. ed. 1613). The only meritorious issue before us is whether Michigan may determine the amount of such privilege fee by reference to appellant's total business transacted in Michigan which, for our purposes we may assume, as appellant claims, was solely interstate in character, or whether it may be charged a franchise fee in excess of the $10 minimum fee provided by the statute only when it actually conducts intrastate business in Michigan and then by reference only to such intrastate business.

The *Gartland* case, 339 Mich. 661, seemingly supports appellant's contention that interstate business must be excluded from consideration in determining the apportionment formula used in computing the franchise fee. *Parkanelli*, 344 Mich. 50, likewise seemingly supports appellant's contention. In the *Dalati* case, 353 Mich. 636, however, this Court severely limited the opinions in Gartland and Parkanelli and, realistically considered, overruled their holdings to the extent that they could be construed to mean what appellant claims for them here. Our majority in Duluth expressly held Gartland and Parkanelli notwith-

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"Both *Gartland* and *Parkanelli* opinions, however, relied upon *Conney* v. *Minnesota Stock T. & T. Co.*, 291 US 384 (54 S Ct. 477, 79 L ed 934), for constitutional authority. Both failed to distinguish between the direct taxation of *interstate* commerce (which *Conney* ruled out) and the employment of an interstate-commerce factor in the formula for determining the amount of paid-up capital and surplus to be allocated to Michigan in computing the fee to be assessed for doing intrastate business in Michigan." 353 Mich. 636, at p. 665.

standing, "that there is no constitutional barrier to the use of an interstate commerce factor in the allocation formula for determining the portion of paid up capital and surplus allocable to Michigan for computation of a franchise tax for the right to carry on intrastate business in Michigan where, as here, there is no showing that such formula reaches an unreasonable or discriminatory result." 353 Mich. 636, at p. 665.

The United States Supreme Court expressed the principle affirmatively in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, at pp. 609, 610, as it relates to a taxpayer engaged in both intrastate and interstate commerce:

> "[A] state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate."

In *Cleveland-Cliffs Iron Company* v. *Corporation & Securities Commission*, 353 Mich. 652, the taxpayer challenged not the apportionment formula utilized in determining what portion of its paid-up capital and surplus was allocable to Michigan for annual franchise fee purposes but, rather, the inclusion in its capital account of stock investments claimed to be separable from its Michigan operations. Invoking the provisions of C.L.S. 1956, [illegible] (Stat. Ann. 1961 Cum. Supp. 21.209[5]),[2] Cleveland-Cliffs sought to exclude such investments from the paid-up capital and surplus *base* to which the apportionment factor is applied. The Court's majority carefully established the nature of the privilege fee involved saying [illegible] "AND are a tax on the privilege of carrying on intrastate business

[2] Appellant here, unlike Cleveland-Cliffs, did not seek adjustment of its franchise fee liability by claiming immunity accorded by administrative action authorized by this statutory provision.

"It is thus completely pointless for plaintiff to argue that when it came into this State it 'did not apply for admission to the State of Michigan with respect to holding investments in steel stocks.' Nor did it specifically, with respect to its iron ore holdings in Minnesota, or to its office furniture in Cleveland. Here we are not taxing these things. We are taxing the value of the exercise of a privilege in this State and we ascertain that value through the application of property, payroll, and sales factors to the fair average stock value or the paid up capital and surplus."

The proofs disclosed that Cleveland-Cliffs' business activities in Michigan, apparently including intrastate as well as interstate activities, were extensive and constituted a substantial part of its total business. Unlike the case at bar, the Court there was dealing with a taxpayer concededly actually exercising the granted privilege. As we have noted above, however, the franchise fees payable in this State whether or not the privilege is exercised. And whether or not the privilege is exercised does not under our statute make any difference in the basis for determination of the amount of the annual fee payable, either by a domestic or a foreign corporation nor, as we have previously said in *Dalpati*, 353 Mich. 638, at p. 665, is there any reason constitutionally to bar use of interstate commerce factors in making such determination.

Whether or not the privilege granted a taxpayer to do an intrastate business is exercised has nothing whatever to do with the right of a state, unhampered by the commerce clause, to charge for such privilege a fee based upon a reasonably allocated portion of the taxpayer's capital and surplus. What Michigan says to the taxpayer, in effect, is this: "Separate and apart from your unquestioned right to exercise your corporate franchises in interstate com-

merce within this State, without imposition by this State of a fee for the exercise of that right, you may also pursue your business within this State in matters not involving interstate commerce, but only upon payment of a fee for that privilege. That fee will be measured by determination of that portion of your total paid-up capital and surplus available for such intrastate business, whether or not the privilege actually is exercised by you." In *Ford Motor Company v. Beauchamp*, 308 U. S. 331 (60 S. Ct. 273, 84 L. ed. 304), relied upon and quoted by our majority in *Cleveland Cliffs*, 251 Mich. 452, at pp. 625, 626, the United States Supreme Court, at p. 336, recognized the constitutional propriety of measuring the fee for the privilege, the worth of such local privilege by the "financial power" or capital potency available for use within the taxing state upon exercise of the privilege granted:

> "In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason it is held that an entrance fee may be properly measured by capital wherever located, the weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state."

It is not now open to dispute that when such intrastate privilege is exercised by a taxpayer the fee charged for such privilege may be based upon a portion of the tax-

payer's capital and surplus, wherever located, allocated in the manner provided by Michigan's statute. *Ford Motor Company* v. *Beauchamp, Duluth, and Cleveland-Cliffs, supra*, and cases cited and discussed in Duluth, at pp. 660-663 and in Cleveland-Cliffs, at pp. 690-698. Even in such cases in which the local privilege actually has been exercised, the privilege fee is determinable not by allocation to the taxing state of that portion of the corporate taxpayer's capital and surplus actually utilized therein but, rather, by allocation of that portion of its capital and surplus reasonably available for such use. There is no constitutional reason, absent discrimination between domestic and foreign corporations, why a state may not determine corporate franchise fees on the basis of the potential capital,—the financial power of capital potency,—reasonably available to a corporation for use within the taxing jurisdiction, whether or not actually so used.

The statutory scheme of taxation discloses that the incidence of Michigan's corporate franchise tax is that portion of the taxpayer's paid-up capital and surplus actually utilized in Michigan for any purpose,—therefore available for use here in exercise of its local privilege,—and, thus, theoretically at least, not available for use elsewhere nor subject to a similar tax in other states. Apportionment of a multi-state corporation's capital and surplus is accomplished in Michigan in several days depending upon the nature of the taxpayer's business. For most taxpayers, this apportionment is determined by formula taking into account the taxpayer's property, payroll and sales in Michigan and everywhere. For carriers by aircraft, the apportionment is determined by formula taking into account both revenue tons handled and originating revenues in Michigan and everywhere. Railroads' franchise fees are deter-

mined by use of another formula, as are the fees of certain financial institutions and the fees of motor carriers of passengers. Finally, the franchise fees of motor carriers of property and carriers of passengers or cargo by water, with which we are here concerned, are determined by formula taking into account tonnage of revenue passengers and revenue cargoes received and discharged in Michigan and everywhere.

Contrary to appellant's assertions, the various formulae involved in the apportionment process do not result in the imposition of the franchise fee upon the taxpayer's property, payroll, sales or upon any other factor referred to in those formulae. See Cleveland-Cliffs, 351 Mich. 652, at p. 682. The references to property, payroll, sales, revenue tons, originating revenues and passenger and cargo tonnages have as their sole objective establishment of a realistic standard for allocating a reasonable portion of the taxpayer's capital and surplus to the taxing state as a base for imposition of its franchise fee rate.

Having concluded that a state may charge its corporate franchise fee to a foreign corporation granted local privileges, whether or not actually exercised, and since the amount of the fee charged by Michigan is not dependent upon whether, and to what extent, intrastate business is actually conducted in Michigan, it is not necessary to review the corporation tax appeal board's finding that appellant was engaged in such intrastate business during the periods involved in this appeal.

Affirmed. No costs, there being involved statutory and constitutional provisions affecting the State's revenues.

APPENDIX B

ORDER DENYING APPLICATION FOR REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 9th day of October in the year of our Lord one thousand nine hundred and sixty-three.

Present the Honorable LELAND W. CARR, Chief Justice, JOHN R. DETHMERS, HARRY F. KELLY, EUGENE E. BLACK, THOMAS M. KAVANAGH, THEODORE SOURIS, OTIS M. SMITH, MICHAEL D. O'HARA, Associate Justices.

Wisconsin & Michigan Steamship Co.,

vs. 49718

Corporation and Securities Commission.

A motion for rehearing having been heretofore submitted herein, it is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 11th day of October in the year of our Lord one thousand nine hundred and sixty-three.

DONALD F. WINTERS
Clerk

APPENDIX C

Statute and Constitutional Provisions

Act No. 85 of PA 1921, §§ 4 and 5 (e), as amended CLS § 450.304 and 450.305 (e); MSA, 1963 Cum. Supp. § 21.205 and 21.208(3) and (5), Secs. 4, 5e and 5f.

"Sec. 4. Every cooperative association and every profit corporation organized or doing business under the laws of this state, or having the privilege to do business, employing capital or persons, owning or managing property or maintaining an office, or engaging in any transaction, in this state excepting domestic and foreign insurance companies, domestic and foreign building and loan and savings and loan associations, medical care corporations, hospital service corporations, state and national banking corporations, trust companies, and such corporations now in existence or hereinafter incorporated formed with the consent of the banking commissioner for the state of Michigan for the purpose of taking over all or part of the assets of closed banks or trust companies with the intent and purpose of liquidating such assets when and as conditions warrant such action by said corporations, shall pay, at the time of filing the annual report with the Michigan Corporation and Securities Commission, as required by sections 81 and 82 of Act No. 327 of the Public Acts of 1931, being sections 450.81 and 450.82 of the Compiled Laws of 1948, an annual fee of (4) mills upon each dollar of its paid up capital and surplus; but such franchise fee shall in no case be less than $10.00. Operating railroad, interurban railroad, telephone, telegraph and express companies heretofore exempt from this franchise tax shall be exempt as to the franchise tax payable in 1953 and thereafter unless the state board of assessors has certified prior thereto to the Michigan Corporation and Securities Commission,

that the specific tax rate under Act No. 282 of the Public Acts of 1965, as amended, being sections 207.1 to 207.21 of the Compiled Laws of 1948, has been based upon state equalized valuation. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within the state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period. The Michigan Corporation and Securities Commission shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the privilege fee to be paid by such corporation. For the purpose of this act only, each share of no par value shall be deemed to have the value of at least $1.00, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the Michigan Corporation and Securities Commission, whichever may be the higher. In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be deemed to be the authorized capital stock for the purposes of this act.

"The term 'surplus', as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid up capital; but in no case, either as to domestic or as to foreign corporations, shall any deduction be made from the item of paid up capital, in computing the franchise fee thereon, by reason of any impairment of the same.

"Sec. 5c (1). In the case of motor carriers of property and carriers by water, the annual franchise fee shall be measured by that portion of the corporation's paid up

capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this state is to the total of such tonnage so received and so discharged by such carrier within and without this state."

"Sec. 36. If it shall appear on the application of the taxpayer or otherwise that an allocation factor determined pursuant to this act does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust it by:

(1) Excluding 1 or more of the factors or any component thereof;

(2) Including 1 or more other factors, such as expenses, purchases, contract values (using subcontract values);

(3) Excluding proportionately 1 or more assets from the computation of entire paid-up capital and surplus; or

(4) Apply any other similar method calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state.

"The commission shall promptly publish its rulings with respect to any application of the provisions of this section. Such rulings shall be promulgated in accordance with the administrative procedure act."

APPENDIX D

(Exhibit 5)

FOSTER & MEADOWS
Penobscot Building
Detroit 26
October 3, 1955

Honorable James C. Allen, Commissioner
Michigan Corporation and Securities Commission
Bank of Lansing Building
Lansing, Michigan

Dear Mr. Commissioner:

Wisconsin & Michigan Steamship Company
Annual Franchise Fee

This letter is written in furtherance of telephone conversation between you and the writer last Friday in connection with the above.

This matter came to our attention some weeks ago, at which time the writer telephoned Miss Ann Sawasky and discussed the matter with her on the phone. At that time she requested the same data with respect to revenue passengers and revenue freight as was given in the 1954 Annual Report. We advised at that time that the company transported no property between points in the State of Michigan or intra-state commerce. We nevertheless suggested that Mr. F. J. Knoblauch furnish the information requested, and he did this in his letter of September 6, 1955, pointing out that all traffic handled was in interstate commerce and there was no traffic in intra-state commerce.

Miss Sawasky advised the company under date of September 14 that the privilege fee was figured on the paid in capital of $222,000 and surplus of $2,610,741 at the rate of 4 mills on the dollar, which results in $5,470.52 plus a

filing fee of $2 for a total of $5,472.52. The company had previously submitted $12, of which $2 was the filing fee and $10 was the privilege fee.

Wisconsin & Michigan Steamship Company is a Wisconsin corporation with its principal office for the transaction of business at 358 N. Plankinton Avenue, Milwaukee 3, Wisconsin. The company holds a certificate from the Interstate Commerce Commission given under Part III of the Interstate Commerce Act in Docket No. W-294 authorizing the company among other things, to transport passengers and commodities generally between the ports of Milwaukee, Wisconsin, and Muskegon, Michigan.

In all of the traffic involved during the period in question, the company moved no traffic whatever from one point in Michigan to another point in Michigan. The Michigan statute under which the company pays its privilege fee was involved in the case of *Cartland Steamship Company v. Michigan Corporation & Securities Commission* and is reported at Volume 339 Michigan Reports, page 661. From a reading of that case it would appear plain that Wisconsin & Michigan Steamship Company, being a foreign corporation licensed in this State, should not be taxed in connection with cargoes transported in interstate and foreign commerce.

We have also again re-examined the case of *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. Rep. 508, which would appear to be controlling in the situation we have here. It is the position of Wisconsin & Michigan Steamship Company that the payment of the $10 fee plus the $2 filing fee is all of the privilege fee which they are required to pay under the Michigan statutes.

Some confusion may have arisen because of the manner in which paragraph 2 of the 1955 report is filled in. Under

the heading, "The act under which incorporated or reincorporated," there was filled in, "Act 327 Public Acts of 1931." This is obviously in error, as the company was organized under the general corporation laws for the State of Wisconsin, and what was intended by the company was that the company was admitted to do business in Michigan under the appropriate provisions of Act 327, Public Acts of 1931.

If the letter of Miss Ann Sawasky under date of September 14, 1955, is a tentative determination of the company's tax, would appreciate a final determination being made so that if the same is adverse the matter may be taken to the Appeal Board under the appropriate provisions of the act. We would call your attention to the attachment to the Michigan Annual Report as filed, wherein it is pointed out there was no intra-state commerce involved and that 100% of the transportation service performed by the company was in interstate commerce.

We shall await your further advices in the matter.

Very truly yours,
FOSTER & MEADOWS
By: Sparkman D. Foster

SDF:lc
cc: F.J. Knoblauch, Vice President
Wisconsin & Michigan Steamship Company
350 N. Plankinton Avenue
Milwaukee 3, Wisconsin

APPENDIX E

(Exhibit 6)

January 6, 1956

Foster & Meadows
Law Offices
Penobscot Building
Detroit 26, Michigan

Re: Wisconsin & Michigan Steamship Company
Franchise Tax 1955

Gentlemen:

It appears that the above named corporation had no intrastate commerce in Michigan during the period covered by the 1954 Annual Report, and that it is substantially in the same position as was Gartland Steamship Company with regard to activities in Michigan.

Relying upon the Gartland case and the decision in *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. Rep. 508; the Commission determines to accept the Report as filed and determine the tax as paid.

Yours very truly,
James C. Allen,
Commissioner

JCA:ed

APPENDIX F

(Exhibit 14)

Corporation
AM:ed
September 14, 1955

Wisconsin & Michigan Steamship Company
350 E. Plankinton Ave.
Milwaukee 3, Wisconsin

Gentlemen:

Your letter of September 9, 1955 received.

The ratio of tonnage received and discharged in Michigan to the total tonnage received and discharged is .49860.

The privilege fee is figured on the paid in capital of $232,200 and surplus of $2,510,741 at the rate of 4 mills on the dollar which results in $5,470.52 plus a filing fee of $2.00 for a total of $5,472.52. Your remittance leaves a balance due the State of $5,460.52. Kindly remit.

Very truly yours,
Ann Sawasky, Director
Profit Annual Report

APPENDIX G

(Exhibit 15)

FOSTER & MEADOWS
Penobscot Building
Detroit 26

February 23, 1956

Michigan Corporation and Securities Commission
Lansing 4, Michigan

Gentlemen:

Wisconsin & Michigan Steamship Company
Franchise taxes for years 1952, 1953 and 1954.

This letter is written in furtherance of recent correspondence between the writer and James C. Allen, former Commissioner, Michigan Corporation and Securities Commission. We would particularly refer to our letter of October 3, 1955, addressed to the Commissioner and his letter to us under date of January 6, 1956, with respect to franchise taxes of Wisconsin & Michigan Steamship Company for the year 1955.

It is our understanding that Wisconsin & Michigan Steamship Company operated on the same basis for the years 1952, 1953 and 1954, and that there was an overpayment of franchise taxes for those years. We say this for the reason that it is our understanding that the company's entire business during the years 1952, 1953 and 1954 or for the tax periods covering those years was wholly interstate. That is to say, there was no traffic handled in intrastate commerce between points in the State of Michigan. It would appears therefore, that company is entitled to a refund for the overpayment of its taxes for the three years in question, as there was a tax due for each of those years of only $10 per year plus $2 filing fee for each year.

The company, accordingly, at this time requests a refund be set for the overpayment as disclosed by the books and records of the Commission, which we understand will show that taxes were paid as follows:

1952	$ 3,891.19
1953	4,389.03
1954	4,947.48
Total	$12,908.70

The amount which should have been paid for the three years was $10,365.92, leaving an overpayment of $2,542.78.

If this letter cannot be considered as an application for refund, we would appreciate being supplied with proper forms for that purpose.

Awaiting your early advices, we remain

Very truly yours,

FOSTER & MEADOWS

By: Sparkman D. Foster

APPENDIX H

(Exhibit 16)

MICHIGAN CORPORATION AND SECURITIES COMMISSION

Corporation
AM
March 13, 1956

Mr. Sparkman B. Foster
Foster & Meadows
Penobscot Building
Detroit 26, Michigan

Re: Wisconsin & Michigan Steamship Company

Dear Mr. Foster:

We indicated in our letter of February 27, 1956, that the matter has been referred to Mr. William D. Dexter, Assistant Attorney General.

Please be advised that your letter of February 29, 1956, will be taken as an application for refund under Section 16, Act 265, Public Acts 1931 as amended by Act 15, P.A. Acts of 1945, on the 1955, 1954 and 1953 reports. The law requires that you file requests for refunds on the 1952 report, as provided by statute.

Supplemental reports will be required for the three years mentioned. Since this matter is to be handled by the Department of the Treasury, Income Tax Division, we have forwarded your letter to that office for their consideration and will be advised at this time.

Very truly yours,

Arthur Sawicki

Executive Assistant Director

APPENDIX I
(Exhibit 36)

May 10, 1960

Mr. Sparkman D. Foster
Foster, Meadows & Ballard
4372 Penobscot Building
Detroit 26, Michigan

Re: Wisconsin & Michigan Steamship Company

Dear Mr. Foster:

Your petition for refunds in accordance with Section 10, Act 85, P.A. 1921, as amended, of the 1952, 1953 and 1954 Annual Reports and your petitions under Section 5(e), Act 85, P.A. 1921, as amended, for adjustment of the allocation factor to be used in computing 1956, 1957, 1958, and 1959 franchise fees have been considered.

Michigan Annual Reports for the years 1956, 1957, 1958, and 1959, have been submitted by the corporation with payment of a $12.00 fee for each year, using zero as the apportionment ratio because its vessels travel between Muskegon, Michigan, and Milwaukee, Wisconsin, with no intermediate stops.

The corporation voluntarily qualified to do business in Michigan and while it remains qualified is required to pay an annual fee for the privilege of exercising that privilege, based on its activity. The statute provides that the fee for a carrier by water shall be computed on the portion of paid-in capital and surplus represented by the ratio of tonnage of revenue passengers and revenue cargo received or finally discharged in Michigan to the total of such tonnage so received and so discharged everywhere. There has been no showing by the corporation that this

formula reaches an unreasonable or discriminatory result and the fee has been determined by this Commission, using the statutory formula as follows:

Year	Ratio	Privilege & Filing Fee	Paid	Balance Due
1956	.498832	$6,345.17	$12.00	$ 6,333.17
1957	.498634	6,972.87	12.00	6,960.87
1958	.498503	7,623.56	12.00	7,611.56
1959	.498156	8,037.30	12.00	8,025.30
TOTAL				$28,930.90

Payment of this amount is requested.

With regard to the request for refund on the 1952 report, this Commission finds that more than three years had elapsed from the date of such alleged overpayment, and the request is therefore denied. This Commission finds further that there is no basis for refund of all fees above $12.00 paid by the corporation for the years 1953 and 1954, as outlined in your petition dated February 23, 1956, and this request is also hereby denied.

Very truly yours,
Lawrence Gubow
Commissioner.

LG:pl
cc: Wisconsin & Michigan Steamship Company
350 N. Plankinton Avenue
Milwaukee 3, Wisconsin
Annual Reports Division